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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Petitioners.

v.

EDDIE WITTSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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Opinion Below.

The Opinion (R. 122-139) of the District Court for the Southern District of New York is reported at 223 F. Supp. 27. The majority and minority opinions (R. 180-191) of the Court of the Appeals for the Second Circuit are reported at 326 F. 2d 26.

Jurisdiction.

Judgment of the Court of Appeals, having been entered on December 18, 1963, Petitioners invoke 28 U. S. C. Section 1254 (1) for jurisdiction. This Court granted *certiorari* March 9, 1964 (R. 194), 376 U. S. 942.

Questions Presented.

1. Was Petitioners' actual voting procedure, which purported to enact RECOMMENDATION No. 11 at the 66th Convention in June, 1963, violative of Title I, Section 101 (a)(1)(2) and (3) and Title V, Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, *et. seq.*, 29 U. S. C. §§401 *et. seq.* (hereinafter called "LMRDA") to the extent that, with no notice to the AFM members and only six hours notice to the Convention delegates (on the third day of the Convention), it increased union dues and initiation fees, in part by means of split votes and duplicate votes?

2. Is Article 5 of the Constitution of the American Federation of Musicians of the United States and Canada (hereinafter called "AFM"), as applied at said 66th AFM Convention to "enact" RECOMMENDATION No. 11 by "roll-call vote", consistent with LMRDA (especially with Section 101 (a)(1), (2) and (3) thereof), since said Article 5 of AFM Constitution does not vest control over increases of AFM dues and initiation fees in AFM *members*, nor in their *delegates* in convention assembled?

3. Since the complaint herein admittedly seeks (a) a declaration that RECOMMENDATION No. 11 in its entirety is null and void and (b) an injunction restraining AFM from putting it into effect; and since the grounds on which plaintiffs seek such relief include facts showing material violation of AFM By-laws and of Section 501 of LMRDA by AFM officers who engineered "enactment" of RECOMMENDATION No. 11, and violation of Section 101 (a)(1), (2) and (3)(B) of the LMRDA; is the present appeal premature and should it be deferred until the trial of *all* issues raised

by said complaint (especially since Respondents never moved for nor sought summary judgment)?

4. Does the Record demonstrate that Section 501 (a) of the LMRDA was so violated as to nullify RECOMMENDATION No. 11 in its entirety on the grounds: (A) that the Court below had pendant jurisdiction over such violation; (B) Petitioners' officers in conducting the Convention breached their trust and fiduciary responsibility in relation to the AFM as an organization and to its members as a group, by

(a) "railroading" RECOMMENDATION No. 11 through said Convention;

(b) disobeying material and relevant provisions (respecting notice to delegates and to Locals of proposed changes of AFM By-laws) of Petitioners' Constitution and By-laws;

(c) suppressing, before and during the 66th Convention, vital information needed by delegates, members and Locals for intelligent and democratic consideration of RECOMMENDATION No. 11 and the problems it presupposed;

(d) misleading and misinforming AFM members, Locals and delegates respecting the problem with which RECOMMENDATION No. 11 purports to cope;

(e) limiting debate and free discussion on RECOMMENDATION No. 11 at said Convention to an evening session (the voting began after midnight) and to fifteen delegates, of whom nine were "hand picked" by AFM President Kenin (who chaired the Convention, and who favored the RECOMMENDATION) as members of the Committees which controlled the Convention and made it operate in "railroad" fashion;

(f) permitting vote-splitting and the casting of between 26,000 and 52,000 (depending upon which version given by AFM witnesses is correct) duplicate ballots during the vote on the RECOMMENDATION; and

(g) denying to AFM members and their delegates fair and equal representation of constituent units, democratic procedures and an opportunity to ensure that dues increases would not be imposed by irresponsible, arbitrary union leaders, not answerable at the time to the membership at large?

5. Did the "OFFICIAL PROCEEDINGS"* of the said 66th AFM Convention demonstrate that the Convention voting procedures which purported to enact RECOMMENDATION No. 11 deprived the delegates at such Convention as union members of equal rights granted to union members by Section 101 (a) (1) and (2) of LMRDA, thereby invalidating RECOMMENDATION No. 11 entirely?

Constitutional and Statutory Provisions Involved.

This case involved Title I, Sections 101 (a) (1) and (3), 29 U. S. C. §411 (a) (1), (2) and (3) as well as Title V, Section 501, of LMRDA. Sections 101 (a) (1) and (3) appear in Appendix A (pp. 58-59) of Petitioners Brief.

Counter Statement of the Case.

Factual Background.

The relevant *union* "law" is fully quoted (R. 126-130) in the Opinion of the United States District Court for the Southern District of New York, 223 F. Supp. 27, 33.

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* The "Official Proceedings" printed and distributed by AFM are herein referred to as "Proc." followed by the page number.

The complaint (R. 3-23) seeks a declaratory judgment (R. 22) nullifying as illegal the entire RECOMMENDATION No. 11 (Proc. 55-56). That RECOMMENDATION was a proposed resolution eventually "enacted" as AFM "law" by the 66th Annual AFM Convention held June 10-15, 1963, at Miami Beach, Florida. The "OFFICIAL PROCEEDINGS" of this Convention, as printed by AFM, are part of the record.

Proceedings in the Court Below.

On *Petitioners'* motion for summary judgment (R. 42-72, 108-121) the District Court granted *Respondents* (who had not moved for it [R. 73-104]) partial summary judgment, *i.e.*, to the extent of nullifying as illegal the increase of union dues and initiation fees mandated by paragraphs 2, 3, and 4 of RECOMMENDATION No. 11. The District Court held that these increases violated Section 101 (a) (3) (B) of LMRDA (R. 133; 138).

The original judgment (R. 143-144) was, on the consent of the parties, revised to read as follows:

> "Defendant having moved this Court for an order modifying and clarifying the Judgment dated October 30, 1963, heretofore entered in this action; this Court having heard the arguments of counsel and having been fully advised, it is
>
> "ORDERED that the first and second decretal paragraphs of the Judgment entered in this action on October 30, 1963 be modified so as to provide:
>
> "ORDERED, ADJUDGED, DECREED AND DECLARED that Items Nos. 3 and 4 of the Recommendation No. 11, passed at the 1963 Annual Convention of the American Federation of Musicians of the United States and Canada, insofar as they increase the dues and initiation fees of its members, were invalidly enacted

under Section 101 (a) (3) (B) (i) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411 (a) (3) (i); and it is further

"ORDERED, ADJUDGED, DECREED AND DECLARED that Item 2 (a) of Recommendation No. 11 shall not be construed to authorize an increase of union dues payable by members without compliance with Section 101 (a) (3) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411 (a) (3)."

Thus, the case, insofar as it concerns the remaining illegal features (R. 40-41) of RECOMMENDATION No. 11, challenged in the complaint, remains to be tried in the District Court, where it is still pending; and this appeal concerns only the *partial* summary judgment just quoted.

Relevant Facts and Events.

The complaint (R. 3-23) and the affidavit of Godfrey P. Schmidt (R. 73-104) set forth indisputable relevant facts and events, as derived from the "OFFICIAL PROCEEDINGS" of the AFM Convention and from other AFM sources.

RECOMMENDATION No. 11, which is quoted in full in the "OFFICIAL PROCEEDINGS" (Proc. 55-56), was voted at an "Evening Session" between 12:10 A. M. and 2:30 A. M., June 13, 1963 (R. 119). The Session had begun at about 8 P. M. on June 12 (Proc. 53-63; R. 118). The text of RECOMMENDATION No. 11 shows that it is an omnibus enactment, comprising 12 or 13 different and, in some instances, unrelated matters (Proc. 55-56). These included (a) increases of the "Annual Federation Per Capita Dues;" (b) increases of "Federation Initiation Fees;" and (c) increases of "Local regular periodic dues."

In violation of the requirements of democratic procedure, common sense and AFM By-laws, the text of

RECOMMENDATION No. 11 (which had been characterized by Mr. Kenin, AFM President, as the most important resolution ever enacted by an AFM Convention) had been distributed to the delegates less than six hours before they were asked to vote upon it (R. 93). No notice or information respecting RECOMMENDATION No. 11, nor respecting the somewhat similar RECOMMENDATION No. 2 (Proc. 83) had ever been distributed to the delegates, members or Locals prior to Convention.

Appellants' Brief (p. 7) contains a footnote reading in part:

> "At its June 1964 convention, the Federation passed by overwhelming voice vote, a resolution re-enacting the dues and initiation fees increases effective July 1, 1964. On the outcome of this case will determine the legality of the increase for the period of January 1 through June 30, 1964, as well as the legality of the voting procedure for future conventions."

What the footnote does *not* say is that 15 days' notice (prior to the "day set for the first session of the Convention," pursuant to Article 28, Section 4 of the AFM By-laws) was *not* given respecting RECOMMENDATION No. 11; but it *was* given respecting the "resolution re-enacting the dues and initiation fees." By contrast only six-hours notice was given with respect to RECOMMENDATION No. 11. Nor did the 66th Convention in passing RECOMMENDATION No. 11 comply with Article 28, Section 21, of the AFM By-laws.

Debate on RECOMMENDATION No. 11 (termed a "burning question" by President Kenin, chairman of the Convention (Proc. 31), was limited to speeches by fifteen (Proc. 58) out of 1219 delegates (Proc. 30), despite the promise

(R. 80) made by Mr. Kenin that "*full discussion*" of the problem making RECOMMENDATION No. 11 necessary would be allowed. (The "OFFICIAL PROCEEDINGS" do not exhibit the nature or extent of the discussion of RECOMMENDATION No. 11.) *Nine* of the *fifteen* delegates allowed to talk on the matter at the Convention were hand-picked by President Kenin (R. 89-93) and were, of course, in favor of the RECOMMENDATION.

Petitioners were put on notice that they had a problem requiring amendment of their By-laws by complaints in actions filed in the District Court in 1960 and 1962 (60 Civil 4025 and 62 Civil 2552); by the decision of the Court of Appeals for the Second Circuit dated October 17, 1961, (*Carroll* v. *AFM*, 295 F. 2d 484); by the District Court's decision of November 2, 1962 (*Cutler* v. *AFM*, 211 F. Supp. 433); and by the Court of Appeal's further decision of April 30, 1963 (*Cutler* v. *AFM*, 316 Fed. 2d 546, *certiorari* denied, December 9, 1961, 375 U. S. 941). Nevertheless, Petitioners came to the 1963 Convention without even a published draft of any proposed solution to the "burning problem" (Proc. 31) or of any proposed By-law amendment which was required, as they very well knew (R. 83-90; 94-95), to bring AFM practice and By-laws into conformity with Federal statute as authoritatively construed by Court decisions.

AFM "laws" provided *five* methods of Convention voting:

1. Article 28, (entitled "CONVENTION PROCEEDINGS")
2. AFM By-laws:

> "For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided *and the manner of voting shall be viva voce, unless otherwise ordered*". (emphasis added).

2. Unweighted votes by Convention delegates, under ¶21, Article 28 of AFM By-laws:

> "No alterations or amendment to the Constitution or By-laws (except it is otherwise provided in the By-laws or ordered by a convention) shall be made unless proposed in writing, and said alterations or amendments must receive *a majority vote of the delegates present* to become a law, unless otherwise provided" (emphasis added).

3. The *first part* of Article 5, AFM Constitution, calls for weighted voting by delegates: each Local has from one to ten votes, depending upon the size of the Local's membership (R. 126).

4. Voting by *written ballots* is authorized by Article 28, ¶2, AFM By-laws, as supplemented by Robert's Rules of Order, ¶46, pp. 193-196.

5. Vote "on roll-call" is provided in the *second part* of Article 5, AFM Constitution (R. 126). An AFM official admitted that he had never in nineteen years of attendance at AFM Conventions seen this method used (R. 155).

Belatedly, AFM admitted (its "Official Proceedings" do *not* show this) that there were *two voice votes* (R. 176) at the Convention. RECOMMENDATION No. 11 failed to pass either of them (R. 172-173). No standing or rising vote (as required in the circumstances by Robert's Rules of Order) was called for by the Chair after it had twice (falsely) announced that the "Ayes" and the "Nayes" were "of equal response" (R. 98). After the alleged double failure of the "voice vote", an unnamed delegate proposed a vote by *written ballot*: "I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision" (R. 114-115).

The Chairman (an attorney and AFM President: Herman Kenin) immediately misstated this request and answered: "Well, a roll-call vote is what you are referring to. Any ten delegates or five locals may ask for a roll-call vote if you are dissatisfied with the voice vote" (R. 115).

As if by prearrangment, the Chair *immediately* recognized Delegate Merle Snider, who instantly called for a "roll-call vote" (R. 115). *Forthwith* Snider said he *had* five Locals. This was accepted by the Chair with alacrity as *mandating* the rare and peculiar vote on "roll-call" (R. 115-116) under Article 5, AFM Constitution—a method not used in more than 20 years of Annual Conventions.

In those portions of the *verbatim* minutes (R. 114-121) of the Convention eventually revealed by Petitioners, the latter carefully avoided disclosure of the actual proceedings (a) *during the two voice votes* and (b) *during the transition from the voice votes to the proceedings just described* (R. 175-179). Petitioners strenuously opposed Respondents' efforts to obtain the tapes or *verbatim* transcripts of omitted portions of the proceedings (R. 175-179; 169-171). Respondents contend that the Chair deliberately misrepresented the two voice votes; and that, in fact, the voice votes clearly and loudly rejected RECOMMENDATION No. 11 (R. 98). Play-back of the tapes would have shown this (R. 169-170).

The Record shows indisputably that: after the voice votes no motion to reconsider was offered (R. 175-178); the "roll-call" voting began after 12:10 A. M. on June 13, 1963 (R. 119); a delegate asked for a written *ballot vote* (R. 115) which the Chair immediately evaded by misrepresenting it as a call for the unprecedented "roll-call" vote (R. 115), as to which the Chair inaccurately ruled that, if the delegates "are dissatisfied with the voice vote," they could use the "roll-call" vote method (R. 115); delegate Merle

Snider, in calling for the unusual "roll-call" vote *instantly thereafter,* presumed to speak for *six* Locals, although he was the delegate from only one of the six (R. 115); Snider could not possibly have had time (except by pre-arrangement with the Chair) to consult with delegates of *five Locals other than his own* in the instant between President Kenin's ruling on the unidentified delegate's request for a written ballot vote (115a) and Snider's call for the unparalleled "roll-call" vote (R. 115); the Chair did not ask the delegates from the other five Locals whether, in fact, they had demanded the extraordinary "roll-call" vote (R. 115-116); the "roll-call" voting procedure was without precedent (R. 116) or so rare, as the Chair itself admitted (R. 116), that the latter had to explain it to the delegates (116a); the "roll-call" voting procedure used by Appellants under Article 5 of the AFM Constitution (Appellants' Brief, p. 5) is quite different from the usual "Vote by Roll Call" ("Yeas and Nays") described by Robert's Rules of Order, §46, pp. 197-198 (Revised Manual) or used by Congress; the Chair in a bumbling explanation of the "roll-call", authorized without authority in AFM "laws" the *splitting of the membership votes* by delegates and according to their sole discretion (R. 116; 120); the Chair resisted all efforts to postpone the past-midnight vote until the next morning (R. 115; 117-118; 119); RECOMMENDATION No. 11 was rushed through in great haste (R. 117-119; 89-93); delegates found the conglomerate nature of RECOMMENDATION No. 11 a handicap for the purposes of consideration and voting (R. 115; 117-118); a minority of the individual delegates voted for RECOMMENDATION No. 11 (Proc. 7-30; 58-63); and the AFM *members* (as distinguished from their *delegates* at the Convention) had not the faintest knowledge of RECOMMENDATION No. 11 and

the midnight debate concerning it at the Convention (R. 93-98).

In conducting the curious "roll-call" vote, Petitioners included between at least 26,000 and 52,000 duplicate votes (R. 33-34; 73-74; 146-151; 155-165; 109); and they allowed vote-splitting by the delegates (23b; 116a; 120a) according to the untrammelled discretion of the delegates from each represented Local.

The number of delegates attending the Convention was fixed at 1,219 by the Convention's Credentials Committee (R. 151-153).

The vote which enacted RECOMMENDATION No. 11 was 158,068⅔ favoring "Yes" and 113,742⅓ favoring "No" (Proc. 63). Thus, the margin was 44,326⅓. The total number of votes cast by the 22 Locals which had split membership ballots was 15,066 (Proc. 58-63). Exactly how many duplicate votes were cast was not consistently admitted by Petitioners. Scola's first affidavit states that "approximately 26,000 are members of two or more locals" (R. 46). He confirmed this on the stand:

> "Q. Did you give him [Petitioners' attorney] any information to the effect that there were 26,000 members of the AF of M who belonged to two or more locals? A. Yes.
>
> Q. And this is what you meant when you wrote paragraph numbered three of that affidavit? A. That's right.
>
> • • • • • •
>
> Q. You said that approximately 26,000 members • • • are members of two or more locals; isn't that correct? A. That's correct, sir.
>
> Q. Is that a correct statement? A. That is what I said" (146-147).

This would mean, necessarily, that *at least* 26,000 votes were duplicates. But Scola's second affidavit (108-109) contradicts this. There (R. 109) he states that "12,381 members of the Federation are members of more than one Local;" and that they involved at least "26,174 duplicate ballots". AFM witness Neri testified that he could not be sure of the 26,174 figure: "It might come up with more" (R. 160).

The total of the split votes, 15,066, and the sometimes admitted duplicate total of 26,174 amounts to 41,240, which almost wipes out the margin of 44,326⅓ votes by which RECOMMENDATION No. 11 was "passed". If Scola's earlier testimony and affidavit are correct, the duplicate votes exceeded that difference. Neri's testimony confirms that the AFM figure of 26,174 is unreliable (R. 146-155).

Incidentally the theory on which some delegates' votes were split is incomprehensible. For example, Local 204 had *three* delegates; and, under the weighted voting system of the "roll-call" vote, it had 541 votes. Its three delegates cast *one* ballot for "Yes" and 540 for "No"! (Proc. 60).

Summary of Argument.

The 66th Annual AFM Convention increased union dues and initiation fees in violation of Section 101 (a) (3) Title I, of the LMRDA. It violated Congressional intent in applying the "roll-call" vote under AFM Constitution, Article 5. It perpetrated one of the very abuses Congress wanted to eliminate, as the relevant legislative history shows. The majority opinion below correctly construed the applicable statute. There was no genuine vote of the delegates. The Convention violated both the rational

concept of *majority rule* and James Wilson's sound theory of *equal elections*. The 66th Convention was neither *democratic* nor *representative*. Title IV of LMRDA and S. 1137 are irrelevant. Section 101(a)(3) of LMRDA as applied to defendants in this case does not conflict with the First Amendment. It does conflict with AFM Constitution, Article 5, insofar as control is unlawfully vested in an overall Convention Committee.

POINT I.

The 66th annual AFM convention increased union dues and initiation fees in violation of Section 101 (a) (3) Title I, of the LMRDA.

1. **An advisory opinion should not be rendered.** Question No. 1 of the "QUESTIONS PRESENTED" in Petitioner's Brief (p. 2) is academic and unrelated to the realities and events of this case. It asks a general question, sterilized from contamination with the procedures actually used by the 66th AFM Convention in June, 1963. In effect, it asks an advisory opinion. It is "based upon the number of members they [the delegates] represent" and upon "weighted voting," as if the issue here involved merely concerns a mathematical relationship involving many unions.

Respondent's "Counter-statement" demonstrates the unreality of such an issue, and its lack of *real* (as distinguished from verbal) relationship with this case.

There can be no dispute that RECOMMENDATION No. 11 (Proc. 54-55) did purport to increase (a) the "Federation Initiation Fees"; (b) the "Local regular periodic dues"; and (c) the "Federation Per Capita Dues." (141a)

2. **Legislative Intent on Petitioners' theory.** True, "every word of Title I * * * proclaims that Congress was

concerned solely with protecting the rights of members as members and not as delegates or as officers or employees." (Petitioners' Brief, p. 36) What the 66th AFM Convention did was to protect the powerful *delegates* upon the basis of *unequal* votes, without the slightest consideration of the "*members* as members". The discriminatory and unequal protection of the *delegates'* right to participate in a Union meeting (Convention) was based upon voting strength unequally accorded to various delegates. This gave the *countenance* but killed the *soul* of democratic and representative procedure. The "*members* as members" of populous AFM Locals had no more participation in the Convention than the "*members* as members" of the small Locals. Each *Local membership* was entirely bereft of *democratic participation* and *representation*. The *delegates* acted *for themselves* and *on their own discretion*. Yet it was not really just the *delegates' vote* which was listed on the tally sheets. Delegates from Locals with large memberships, were given voting rights superior to those of *delegates* from lesser Locals. The rights of "*members*, as members", were not safeguarded nor protected in any way by the "roll-call" vote. The only rights that were protected were those of the alliance which ran the Convention, an alliance of influential delegates and AFM officers. On Petitioners' theory (p. 37), Congress had more solicitude for the rights of *delegates* (not members) from large Locals, and less solicitude for the rights of *delegates* (not members) from non-populous Locals. The 66th AFM Convention subordinated the paramount interest of the "*members* as members" in *equality of representation* to the "roll-call" vote method under which the mere AFM *member* was a non-entity.

3. **A non-Congressional view of legislative intent.** In his article entitled "*The Labor-Management Reporting and*

Disclosure Act of 1959", Benjamin Aaron, in the Harvard Law Review (Vol. 71, March 1960, No. 5, pp. 851-907, 866) discusses his theory of Congress' legislative intent:

> "Section 101(a)(3) of the new law provides that, except in the case of a federation of national or international unions, no labor organization may increase the rates of dues and initiation fees in effect on the date of the law's enactment, nor may it levy a general or special assessment upon its members, unless it follows prescribed procedures • • •
>
> "The language of the McClellan amendment to S.1555 differed significantly from §101(a)(3) as it now stands in these respects: First, it did not so carefully differentiate between the appropriate procedures by which dues or initiation fees could be increased, or assessments levied, by local unions on the one hand, and by national organizations on the other; second, it contained an absolute prohibition against charging any individual seeking to become a union member an initiation fee 'in excess of seventy-five percentum of the amount of the prevailing weekly wage • • •'.
>
> "*The basis for including §101(a)(3) in Title I of the new law has never been clearly established.* Section 8(b)(5) of the National Labor Relations Act [61 Stat. 141 (1947), as amended, 21 USC §151(b)(5) (1958)] makes it an unfair labor practice for a union to require of employees covered by a valid union security agreement an initiation fee which the NLRB finds 'excessive or discriminatory under all the circumstances'. Only a few cases charging a violation of that section have been filed since its enactment in 1947, and these have tended to involve claims that initiation fees were discriminatory rather than excessive. The fact is that the overwhelming majority of unions require only reasonable initiation fees and dues, and ***few issues are more likely to arouse active opposition and general membership participation***

> *than a proposal to increase dues. One suspects that the real target here is union assessments.* Those who oppose the political activities of organized labor are especially sensitive to assessments for such purposes • • •.
>
> "Section 101(a)(3) does not get at these issues; the most it can do is *insure that union fees will not be raised or assessments levied without the consent of the majority.* As Professor Cox has pointed out, however, the principle of majority rule should not be the sole criterion, 'because the very question at issue is whether the individual or minority should be guaranteed this degree of political liberty regardless of the will of the majority, just as the Constitution guarantees religious liberty and freedom of speech to political minorities.' " (emphasis added).

Congress did *not* adopt Professor Cox's view; nor does Professor Cox, as Solicitor General (in the Brief of the Justice Department) adhere to the view he expressed while a University Professor.

4. **The Abuses Congress sought to discourage.** Abuses in the conduct of union conventions and in the voting procedures thereof had come to the attention of Congress. Hearings before the Select [McClellan] Committee on Improper Activities in the Labor or Management Field (85th and 86th Congress) Parts 1, 2, 5, 8, 10, 11, 12, 13, 27, 28, 30, 36-40, and 57.

This was particularly true of the rigged Teamster Convention which resulted in the election of Mr. Hoffa at the International Brotherhood of Teamsters' Convention at Miami Beach in 1957. It was also true of the rigged election of Joint Council No. 16 of the International Brotherhood of Teamsters in 1956 (*Lacey* v. *O'Rourke*, 147 F. Supp. 922), which became the subject matter of four volumes of

investigation by the McClellan Committee. *Ibid.*, Parts 10, 11, 12 and 13.

It was true, too, of the rigged 1956 Convention of the Bakery and Confectionery Workers Union. *Ibid.*, Part 8.

5. **Interpretation of the relevant statute.** The crucial language of the statute appears in Section 101(a)(3)(B)(i) of LMRDA: "majority vote of the delegates voting at a regular convention." Syntactically and grammatically, the noun, "vote," is modified (a) by another noun, "majority," used as an adjective; and (b) by the adjectival phrase: "of the delegates voting at a regular convention." The majority-*vote* (in the *singular*), as the statute makes clear, is the collective act of the "delegates voting". That is why the word was "vote," not "votes."

Petitioners assume that the word, "majority," in the context here in question, does not mean a "majority" *of delegates* but rather a "majority" *of votes*. But "majority vote" here means *both* a majority of votes and a majority of delegates.

"Congress left each union free • • • to determine the number of votes those delegates could cast." (Petitioners' Brief p. 11). If this were really and literally true, it could justify, in the concrete, a voting arrangement under which Local 802, with 28,438 members, could be given three votes and Local No. 1 with 128 members could be given 30 votes!.

According to Petitioners' theory, the very statute by which Congress sought to protect rank-and-file members against union leaders seeking to increase dues and initiation fees could be used against those members. Armed with an assortment of five voting procedures, the AFM combination which controlled the Convention could experiment and machinate until an apt choice produced desired results.

Where a majority of *delegates* could not be obtained, a *membership* majority, distributed without the knowledge of the members, according to the unfettered discretion of the *delegates, might* (and in this case *did*) do the job.

Delegates whose voting strength is multiplied by factors equal to the numbers of members in the *large* locals would, under the interpretation urged by Petitioners, enjoy an influence completely out-classing that of numerous delegates from small Locals. A relative handful of delegates with heavily weighted voting power could take over a convention.*

The LMRDA gives to the majority "*vote*" of the *delegates collectively* "voting at a regular convention" or to the *members themselves* the ultimate control over dues increases. The LMRDA did not give that control to a relatively small number of delegates armed with large balloting leverage. This does not mean that Congress, in the LMRDA, intended to discount the membership strengths of local unions. Doubtlessly, Congress took the usual union procedure for granted: that the *number of delegates* would be increased in proportion to the number of *members of the local* by some reasonable ratio; just as the States are, or constitutionally should be, represented according to certain proportions in the House of Representatives where each member has only one vote.

The vote at the 66th AFM Convention was not a "vote *of the delegates.*" It was not a mere *delegate*-vote. Nor was it a "majority vote *of the delegates voting* at a regular convention" (as the statute requires); nor was it a "major-

* "The plural ... of votes must on no account be carried so far that those who are privileged by it, or the class (if any) to which they mainly belong, shall outweigh by means of it all the rest of the community." *Representative Government*, John Stuart Mill, Chap. 8, P. 386 Encyclopaedia Britannica, Inc., 1952. Britannica Great Books, Vol. 43.

ity vote *of the delegates present*" (as the AFM Constitution, Article 28, Section requires). In reality and in effect, a *balloting by Locals* rather than *by delegates* is what Article 5 of the AFM Constitution mandates on "roll-call." Title I calls for a "majority vote of the delegates voting" [§101 (a) (3) (B)] and for equal votes, since the delegates are members [§101 (a) (1)]. By contrast, the AFM Constitution (Article 5) gives delegates *unequal* voting power, once the delegates from five locals call for the rarely used "roll-call vote." Indeed, Article 5 of the AFM Constitution gives control over decisions of the delegates to an over-all convention Committee largely picked by the AFM President. AFM conventions generally operate by equal voting power, *i.e.*, by "voice votes". The AFM Constitution also allows delegates from five Locals, acting in conjunction with the Chairman of the Convention, to invoke a voting system which, in contrast with the usual voting system employed at union conventions, creates a class of powerful delegates with heavy balloting weight. Intra-convention *class discriminations* lend themselves readily to the juggling of the "smoke-filled room" and to concentration of union power in a few hands by virtue of planned, intra-union political schemes.

Mathematically, a majority of the delegates at the 66th Convention voted against RECOMMENDATION No. 11. (Proc. 58-63) Only when the vote of those delegates was gerrymandered and transmitted (for the first time in more than twenty years) by the peculiar system of weighted voting called by the second part of Article 5, AFM Constitution, was it possible to "enact" RECOMMENDATION No. 11. According to the AFL-CIO Brief, only 19 out of 131 unions have constitutions which permit to use this "weighted voting" system; but nothing in the Record shows that they use this system any more frequently than did

the AFM; or that they ever increase dues by such a weighted-voting system since 1959.

It is not possible without judicial legislation to construe "a majority vote of the delegates voting" to mean a "majority vote of the delegates whose *votes* (not vote) are mathematically equivalent to the number of members they respectively represent."

The meaning of the word, "delegate," is critical. Webster's "*New International Dictionary*," Second Edition, defines "delegate" as follows:

> "One sent and empowered to act for another; a deputy; a representative; a commissioner. Specif.: *a Eng.* Formerly, one of the commissioners constituting the Court of Delegates. *b* A representative of an association or constituency in a convention • • • ".

Nothing that occurred at the 66th Convention illustrates genuine *representation* in the sense of the foregoing definition or in any rational sense. The procedure of those who expedited RECOMMENDATION No. 11 was the antithesis of *democratic* or *representative* procedure.

The very title of Article 5 of the AFM Constitution, "REPRESENTATION AND DELEGATES," suggests that delegates are to be genuine *representatives* of the members. Common practice in the trade union movement in the United States confirms this. The convention is the highest legislative body of any union. Be that as it may, the decision below only forbids use of "roll-call" votes where, in the circumstances of this case, dues increases are involved.

The Congressional debates on the Landrum-Griffin Act as well as the relevant Congressional Reports demonstrate that the chief legislative purpose was to take from union officers (who had frequently abused the power in the past)

the right to increase union dues and initiation fees unilaterally or against the wishes of the majority of members. (House Rep. No. 741, on H. R. House Role 834, Pp. 7-9, 81-82, 29-30; Conference Rep. [H. Rep. No. 1147] on S. Senate 1555, P. 31; Senate Rep. 187 on S. 1555 Pp. 2-10; 70-72.)

Congress intended that the members be protected against the very type of jobbery or intrigue which characterized the 66th Convention. The members never learned of RECOMMENDATION No. 11 before it was "enacted." Their own *delegates* never knew anything about it until six hours before the midnight session at which they three times voted upon it. Debate was artfully and artificially limited to fifteen delegates, of whom nine had been hand-picked by the Chairman who favored the RECOMMENDATION. Deliberation and full discussion of the measure were prevented by the very lateness of the hour.

6. **Contextual construction of statute.** The statutory words, "majority vote", are used *five different times in subparagraphs (A) and (B) of Section 101 (a) (3) of the LMRDA:*

I. *(A) (i)* "* * * *by majority vote*, by secret ballot, of the members in good standing * * *"

II. *(A) (ii)* "* * * *by majority vote* of the members in good standing * * *"

III. *(B) (i)* "* * * *by majority vote* of the delegates voting at a regular convention * * *"

IV. *(B) (ii)* "* * * *by majority vote* of the members in good standing * * *"

V. *(B)(iii)* "* * * *by majority vote* of the members of the executive board * * *" (emphasis added in each instance).

It is significant and indisputable that in phrases numbered I, II, IV, and V, *supra*, there can be no question whatever about the kind of "majority" intended by Congress.

In phrase numbered "I" *(supra)* each *member in good standing* has but *one, unweighted vote;* and the majority of the votes cast, or a majority of the members, controls the outcome of the vote.

In phrase numbered "II" (*supra*) the result is dictated by a majority of the votes or a majority of the members, each of whom casts but *one, unweighted vote.*

In phrase numbered "IV" *(supra)*, which is identical with phrase numbered "II", Congress once more indicated that each member was to have but *one, unweighted vote;* and the majority of the votes or a majority of the members controlled the outcome of the vote.

In phrase numbered "V" *(supra)*, Congress indicated that in voting by members of the Executive Board, each member was to have but *one, unweighted vote.* Therefore, a majority of votes or a majority of members of the Executive Board determined result.

There is no reason to deviate from the rule of "one voter, one vote" (exemplified by phrases I, II, IV and V, *supra*) with respect to phrase III. The latter's meaning is known from the company it keeps. *Noscitur a sociis.*

Since Congress used the phrase, "by majority vote", *five times* in Section 101 (a) (3) (A) and (B), it becomes relevant to inquire into the dictionary meaning of the words, "vote" and "majority". Webster's "*New International Dictionary*" (Second Edition), defines the noun, "vote", in so far as conceivably relevant here:

> 2. A wish, choice, or opinion of a person or a body of persons, expressed in some received and authorized way, as by a ballot or viva voce; the formal

> expression of a wish, will, or choice, in regard to any measure proposed, esp. where the person voting has an interest in common with others in electing a person to office, or in passing laws, rules, regulations, etc.: a suffrage.
>
> 3. Expression of judgment or will by a majority; legal decision by some expression of the minds of a number; as the *vote* was unanimous; a *vote* of confidence • • •
>
> 4. Votes collectively; the collective opinion of a group, party, or assembly, as; the prohibition *vote*. • • •
>
> 7. That by means of which will or preference is expressed in elections, or in deciding propositions, as the voice, a ball, a ballot, a ticket, a voting paper; as, a written note.

It would seem that meanings 4. and 7. (*supra*) are not as applicable to Section 101(a)(3) of the LMRDA as meanings 2. and 3. The wish, choice or opinion referred to by the statute is that of a "body of persons"; namely, "members in good standing", "delegates" and "members of the executive board". The dictionary definition recognizes the two most common methods which are "received and authorized" for the expression of such "wish, choice, or opinion": "ballot" or "viva voce".

The same Webster's "*New International Dictionary*" defines "majority", insofar as here conceivably applicable:

> 2. *a* The greater of two numbers that are regarded as part of a whole or total; the number greater than half; more than half of any total; also, the excess of this greater number, as a vote, over the remainder of the total. *b* Loosely, a plurality.
>
> 3. The group of party whose votes preponderate.

Obviously, in the phrase, "by majority vote", the "group or party" whose votes preponderate are the same as the "body of persons" (in the definition of "vote") who express "in some received and authorized way, their wish, choice of opinion"; namely, the *members in good standing*, the *delegates* taken collectively, and the *members of the executive board*.

As pointed out by Leo Bromwich in his monograph entitled "Union Constitutions" published as a Report for the Fund for the Republic in July, 1959:

> "* * * most of the unions guard against the concentration of too much power in the hands of a single delegate by specifying the maximum number of votes a delegate may have. * * *"

A weighted voting system such as Petitioners advocate is an apt tool, at the disposal of a small number of ambitious delegates representing Locals with large memberships who choose to conspire with, or are cultivated by, AFM Officers scheming the Convention. Such an alliance could easily control a Convention. Concentration of power in the hands of a few received much wise criticism from various issues of "*The Federalist*":

> * * * Justice is the end of government. It is the end of civil society. It ever has been and ever will will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger * * *." (No. 51; p. 164)*

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* All references to "The Federalist" are to Volume 43, Great Books of the Western World, Encyclopaedia Britannica, Inc., Chicago (1952). References to John Locke, John Stuart Mill and Aristotle are to the same collection of classics.

The general rule, "one person, one vote" (here, "one delegate, one vote") is so well and long established* that exceptions to it should be made only for the most persuasive reasons. In the instant case, syntax, semantics, the history of previous intra-union abuses, the potential for future abuse and the theory or philosophy of majority rule all conspire to support the interpretation made by the Court below. It is true that under the "roll-call vote", more than one-half of the total (271,811) *membership-weighted* votes were cast in favor of RECOMMENDATION No. 11. But the "roll-call vote" procedure could not properly be called a "majority vote" in the statutory sense nor "majority rule" in any sense; because it was not really a majority vote *of the delegates*. It was a "majority vote" whereby the delegates were mere conduits for spilling into the tally floods of ballots equal to the number of incognizant union members. The "roll-call vote" is a vote *of Locals*, more than a vote of *delegates*. It was, under the AFM Constitution, Article 5, *subject to veto or approval by an overall committee*.

7. **The false analogy with stockholders votes.** Petitioners attempt to reason analogously by citing Court interpretations of the words, "majority of the stockholders." The short answer is that stockholders *own* corporations to the extent of their stockholdings. Delegates do not *own* the union or its membership. It is some index of their arbitrary use of power that Petitioners resort to an analogy based upon *proprietary rights;* as if delegates had a proprietary right in the union membership. A right of property control like that of stockholders would make union members pawns of delegates in a game in intra-union

* The Federalist No. 22, p. 82; No. 54, pp. 171-172; *Gray* v. *Sanders*, 372 U. S. 368.

politics which is neither *democratic* nor *representative* in any valid sense.

Petitioners are of the opinion that "the stockholder situation provides an informative analogy in construing §101 (a) (3)" (Brief, p. 23). The Court below (apparently relying upon the obvious facts that the stockholders collectively *own* the corporation; and that Convention delegates do *not* own a union) stated (R. 185): "voting by stockholders of corporations is not, we think, an analogous situation."

Petitioners, in differing from the Court below on this point, quote Senator Kuchel: "A union member will receive statutory *protection* for his *rights as a member* in *much the same way* that a stockholder in a business corporation is *protected* by law in his *rights as a stockholder.*" (Brief for Petitioners, p. 23; emphasis added.)

The only analogy which the Senator makes in the quoted sentence is an analogy which concerns statutory *protection of rights.* Just as the *rights of the stockholder* are *protected* by law, so now under LMRDA, are the *rights of union members* protected by law. There is nothing in Senator Kuchel's language which suggests anything about an intra-union method of voting. The conduct of the 66th AFM Convention respecting "RECOMMENDATION No. 11" was such as to deprive the *members* of the union of virtually every possible *protection* or even *opportunity for protection.* They knew nothing whatever of the proposal that was steered through the Convention. They had no opportunity to instruct themselves or their delegates or to express their wishes to their "representatives". If, for this limited purpose of *protection of rights*, the analogy with the stockholders' meeting is appropriate, on petitioners' theory the situation of AFM members *vis-a-vis* the Convention was precisely like the situation of a stock-

holders' meeting attended only by *proxies* who *represent* the stockholders not previously informed as to the agenda of the stockholders' meeting. If the officers of the corporation suddenly presented to the assembled proxy holders a proposed resolution (like a rabbit out of a hat) at an evening session, asking the proxy holders to vote upon the proposition after midnight; then the analogy of union members with stockholders would be appropriate. Under such circumstances, the shareholder could not honestly be said to participate in the corporation's legislative power; and the manner in which the stockholders' meeting was conducted in this analogous and hypothetical case gave no opportunity for "the allocation of legislative power among the members of • • • [the] organization" (Petitioners' Brief, p. 23).

The common, if not universal, practice of allowing voting by shares in private business corporations has no better analogy with the 66th Convention *under the AFM Constitution* than it has with the House of Representatives *under the United States Constitution.*

8. **There was no genuine "vote of the delegates".** The Court below fully justified its decision by the portion thereof quoted at pages 43-44 of Petitioners' Brief. Those who ran the Convention had, under union "laws", an array of five choices of voting methods. Thus, they had alternative tools for managing Convention delegates. The voice-vote method was used twice unsuccessfully (R. 115). A member who asked for a ballot-vote at a more reasonable time (the next morning) was sidetracked by the Presiding Officer of the Convention (R. 115). The Presiding Officer misrepresented the request for a *ballot-vote* to mean a "roll-call" vote, despite the fact that a "roll-call" vote had not been used by the AFM for some 20 years; and despite the fact that the Chair had not candidly announced the outcome

of the voice-vote (R. 98). Prearrangement was evidenced by the instantaneous manner in which the Chair recognized Merle Snider (R. 115), in order to put the "roll-call" vote into operation (under the false guise of giving to the unnamed delegate what he had asked for, namely, a ballot-vote). Such artifice and skullduggery fully warranted the Court's declaration that the voting violated the statute; as did the very text of Article 5 of the AFM Constitution.

In any event, it cannot be said that the vote was really a vote "of the delegates", taking that phrase without qualification. It was a vote of *delegates metamorphosed and vastly multiplied* by membership weightings used in part to hide a purely *verbalized* or *conceptualized* but non-existent "participation by the membership." The members merely lent their *number* as a factor with which to multiply the *delegates' individual choices*, thus disguising them beyond recognition as a vote "of the delegates." The Court below properly indicated that Congress was "admittedly bent on expanding democracy" (Petitioners' Brief, p. 44), an intention which interdicted *unequal representation* such as exemplified at the 66th Convention. It was *unequal* because no two delegates had the same value attached to their ballots. It was not *representation*, because the people "represented" (the members) had no knowledge whatever of what was at stake and had not been given an opportunity (by previous notice such as AFM By-laws themselves required) to inform themselves, to deliberate, or to discuss Convention agenda and to instruct their delegates respecting some or all of such agenda. It was not *representation* because the delegates ("representatives") *themselves* had no previous opportunity for study, deliberation, discussion or consultation among themselves or with their constituents. Capacity to "represent" was debilitated or discouraged by the lateness of the hour and by the limitation on debate

imposed by a cloture limiting the speakers to 15. Only 15 delegates out of more than 1219 were permitted to debate the "burning question" (Proc. 31) and 9 of the 15 were chosen by the Chair to favor the Recommendation. For these reasons Petitioners' Brief (p. 44) errs in insisting that the Court below "reduced reasoning to absurdity". Nor does it matter, as Judge Marshall puts it in his dissent, that there is "no support for the majority's suggestion that dues increases are a *particularly* fertile field for skullduggery" (emphasis added). The majority opinion did not use the adverb "particularly". It is enough that Congress intended to prevent future skullduggery in what had been a fertile field of increasing dues, initiation fees and assessments without membership knowledge participation, as illustrated by the 66th AFM Convention.

The majority opinion below did *not* outlaw a method "which assured equality of representation" (Petitioners' Brief, p. 44). It outlawed a method devoid of both *equality* of representation and of *representation* itself.

Nothing in the legislative history suggests that, as Petitioners aver, "Congress intended the widest possible preservation of established union procedures or practices" (Petitioners' Brief, p. 45). Such an intention would have made the statute unnecessary.

The majority opinion allows ample room for responsible unionism without bureaucratic controls or racketeering. It curbs bureaucratic controls and racketeering by encouraging veritable membership participation according to James Wilson's formula for "equal elections" (*infra*, Section 10). It leaves in the hands of union members and officers the basic responsibility for running unions honestly and democratically. If some Locals are larger in membership than others, it suggests the advisability of proportioning the *number of delegates*, according to some reasonable

ratio, to the *number of members*. This widens representation prudently and tends to make it more responsive to membership needs. It prevents concentration of power in the hands of too few delegates. It multiplies opportunities for healthy difference of opinion and for averaging of the views of delegates.* It makes it very difficult, for union dictators to control a convention in league with powerful delegates. It makes true *representation* more likely by spreading the responsibility of representation among a larger number for the larger Locals, thus creating opportunities for wholesome rivalry in adequate representation. (Why should *two* delegates from Local 802 be allowed to cast 28,438 votes?) It represents, so far as the statute is concerned, a true "vote of the delegates" without qualification. Finally, it is a thoroughly *democratic procedure;* because, instead of putting the membership weighted vote in the hands of one, two or three delegates, it spreads that vote among a larger number, proportioned to the actual number of members represented at a convention.

If, as Petitioners argue (Brief, p. 47), "existing union constitutions and bylaws are themselves a product of that democratic self-government which the Act is designed to

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* Aristotle, "*Politics*," Book III Chapter 11, Volume 9, p. 479:

> "* * *, The principle that the multitude ought to be supreme rather than the few best is one that is maintained, and, though not free from difficulty, yet seems to contain an element of truth. For the many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of virtue and prudence, and when they meet together, they become in a manner one man, who has many feet, and hands, and senses; that is a figure of their mind and disposition. Hence the many are better judges than a single man * * *; for some understand one part, and some another, and among them they understand the whole. * * *"

ensure", there would have been no need for the statute; nor for the widespread changes in union constitutions and by-laws made in 1959 to conform with statute. No vestige of self-government is discernible in the "roll-call" vote which enacted RECOMMENDATION No. 11; since the members who were, on this false theory, "governing themselves" made no decision whatever. Nor could they, because the choice presented *to their "representatives"* had never been intimated to them by any form of previous notice.

The Court of Appeals' decision strikes a blow in defense of union democracy.* It does not, as Petitioners suggest (Brief, p. 51), destroy "the right of members to equal representation" and "the basic right of union members to govern themselves." It is in fact an application of the statute to a rarely used AFM procedure under which union members could not possibly govern themselves; and whereby they are expressly deprived of "the basic right to govern themselves". They are, in fact, made to surrender self-government to uninformed "representatives" who, by the Chair's rulings and the lateness of the hour, were effectually incapacitated from acting as *genuine* representatives. Petitioners themselves prevented the members from enjoying *representation* by refracting, for example, the choices of 28,438 members through the lone judgments of *two* delegates from Local 802. There was no element of self-government here; no opportunity even for information pertinent or essential to the basic right of union members to govern themselves. Self-government, in the matter of undisclosed dues increases, is jejune verbalism.

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* Respondents in their "Brief for Respondents in Opposition to the Petition for Writ of Certiorari" deal (pp. 13-14) sufficiently with Leiserson's book entitled "*American Trade Union Democracy*". For a critique of Judge Marshall's dissenting opinion, the Court is respectfully referred to Point I (pp. 11-27) of the same "Brief for Respondents in Opposition".

9. **Majority Rule.** The "roll-call" vote used for the first time in more than 20 years at the 66th Convention repudiates the true meaning of *majority rule*. You get out of a voting procedure only what you put into it. There is no magical increment. It is an accepted and characteristic example of democratic government that "the majority have a right to act and conclude the rest".* No government, indeed no society, can wait for, or operate on the principle of, unanimity. That is why *majority rule* is needed.

But the rightness or wisdom of an organization's policy cannot be determined *solely* by *counting votes*. Especially is this true where the tally reckons only the choices of the relatively few who "represent" the membership. In other words, use of majority rule, properly understood, does not imply that we neglect the *quality* of judgment because of sole reliance on a quantitative method.

Democratic principle exacts submission to the reasoned judgment and prudence of the majority. It is not a fetish regard for the majority just because it is numerically superior. In the May 23, 1952, issue of "*Commonweal*", John H. Hallowell put the matter thus:

> "• • • We are obligated to submit to the decision of the majority not because that decision represents a numerically superior will but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. • • •

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* "*Concerning Civil Government*", by John Locke, Chap. VIII §95, *ibid.*, Volume 35, p. 46; "*The Federalist*" No. 22, p. 82; "*A General Theory of Authority*" by Yves R. Simon, U. of Notre Dame Press, 1962, pp. 31-50.

"The principle of majority rule is founded upon the belief that the widest possible popular discussion and deliberation is likely to yield wiser decisions than a discussion limited to the few. * * * Democracy attempts to implement the principle that government should rest upon the consent of the people by making provision for the widest possible popular deliberation and participation in the formulation of public policy. * * * The majority vote does not precede deliberation but records a decision reached through deliberation. * * *

"Majority rule, then, presupposes widespread discussion and deliberation and presupposes that the discussion will be conducted in the most reasonable manner possible, to the end that policy may be framed in the interests of the common good. * * *

"* * * To the extent, therefore, that the rule of the majority becomes more an expression of will and less an expression of reasoned judgment, to that degree does it become less democratic and more tyrannical.

"The democratic process is designed to determine by popular discussion and decision the choice of the best means to achieve common ends shared by all. * * *" *The Meaning of Majority Rule*, pp. 167-168.

10. **The *Wesberry* case and James Wilson.** James Wilson, an active member of the Constitutional Convention and later Associate Justice of this Court, in a lecture at Philadelphia, stated:

* * * all elections ought to be equal. Elections are equal, when a given number of citizens in one part of the state, choose as many representatives, as are chosen by the same number of citizens in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same. (2 The Works of James

Wilson (Andrews ed. 1896) 15; quoted in *Wesberry, Jr. et al.* v. *Sanders et al.*, U. S. ; 32 Law Week 4142.)

The analogy between the foregoing comment on "constitutional representation" and representation of Union members by delegates at international conventions is manifest. The same correct, democratic or representative procedure required for such "equal elections" was probably the aim of Congress in §101(a)(3); in view of Mr. Meany's statement that this section of the statute permitted what unions *generally* require; and in view of the examples provided by the House of Representatives and most unions. The AFM "roll-call" vote is not reconcilable with James Wilson's view of "equal elections." But Wilson's rationale is entirely consistent with the majority opinion below. The statutory rule "one person, one vote", has sound historical and philosophical antecedents. This Court recently reaffirmed it in the area of Constitutional Law. *Wesberry, Jr., et al.* v. *Sanders et al.*, U.S. ; 32 Law Week 4142; *Gray* v. *Sanders*, 372 U. S. 368.

11. **Basic theory and philosophical appraisal.** There is an analogy of proportion between voting rights and other democratic rights of *citizens* under their government and voting rights and other democratic rights of *union members* under union government. As was stated in *"The Federalist"* (No. 55):

> In general * * * no political problem is less susceptible of a precise solution than that which relates *to the number most convenient for a representative legislature;* nor is there any point on which the policy of the several States is more at variance, whether we compare their legislative assemblies directly with

> each other, or consider the *proportions which they respectively bear to the number of their constituents*. (Emphasis added; Volume 43, p. 172.)

Later on in the same *Federalist* (No. 55), appears a statement which is completely neglected, despite its obvious truth, in the Brief for Petitioners as well as in the Briefs of the *amici curiae*:

> • • • Nothing can be more fallacious than *to found our political calculations on arithmetical principles.* Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. • • • The truth is, that in all cases a certain number, at least, seems to be necessary *to secure the benefits of free consultation and discussion*, and *to guard against too easy a combination for improper purposes;* as, on the other hand, the number *ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.* In all very numerous assemblies of whatever character composed, passion never fails to wrest the scepter from reason. • • • (Emphasis added; p. 173.)

Petitioners and *amici curiae* seem to think it self-evident that genuinely "democratic" procedures are fostered by an arithmetic voting procedure which allows, for example, two representatives of Local 802, to cast in excess of 28,438 votes; while two representatives of Local No. 50 are permitted to cast 137 votes. Numerical arrangements of this sort do not guarantee democratic rights or procedures. This is clear from what actually occurred at the 66th Convention. It is also evident from philosophic considerations such as those to be found in the following passage from John Locke's essay "*Concerning Civil Government*", Volume 35, Chapter IX, Section 215:

> . . . For it is not a certain number of members, nor their meeting, *unless they have also freedom of debating and leisure of perfecting what is for the good of the society*, wherein the legislative consists; *when these are taken away, or altered, so as to deprive the society of the due exercise of their power, the legislative is truly altered.* For *it is not names that constitute governments*, but the use and exercise of those powers that were intended to accompany them; so that *he who takes away the freedom, or hinders the acting of the legislative in due seasons, in effect takes away the legislative, and puts an end to the government.* (Emphasis added.)

In the light of such principles, what democratic virtue characterized the AFM Convention in weighing the votes of 1,219 delegates by the number (280,000) of members represented by the respective delegates? There was no discussion, no deliberation worthy of the name at the Convention. There were neither deliberation nor discussion by the members in any sense. *The constituents were not informed in advance of the important issues to be considered by their "representatives". The "representatives" themselves received no notice in advance sufficient to allow them freedom of debating and leisure of perfecting what is good for the society.*

The conclusion that RECOMMENDATION No. 11 was ramrodded through the Convention is inescapable from analysis of the "OFFICIAL PROCEEDINGS" of the 66th Convention published by the AFM.

Not only did the delegates themselves receive no adequate prior notice of RECOMMENDATION No. 11, on which they were asked to vote at a midnight session; they were limited in their ability to debate the matter. They did not even learn of the existence of RECOMMENDATION No. 11 until approximately six hours before the moment when they were

asked to vote upon the proposition; and during those six hours they sat in convention listening to the Chair and to 15 speakers—so that they could scarcely study the RECOMMENDATION with attention. The members "represented" by the delegates learned about the entire matter *ex post facto*. They were presented with a *fait accompli*.

Thus, with respect to the membership of 280,000, there was utter violation of the sound and important principle to which Hamilton or Madison referred in "*The Federalist*" (No. 56):

> It is a sound and important principle that *the representative ought to be acquainted with the interests and circumstances of his constituents*. But this principle can extend no further than to those circumstances and interests in which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust. *In determining the extent of information required in the exercise of a particular authority, recourse, then, must be had to the objects within the purview of that authority* (p. 174; emphasis added).

The AFM President had frequently promised the membership by publications appearing in the official organ of the Federation ("*The International Musician*"), that the fiscal problems caused by the *Cutler* case were matters of first magnitude, which would be fully discussed and debated at the Convention. However, Mr. Kenin and his associates waited until six hours before the vote to unveil their proposal for dealing with these weighty matters; and then the delegates had to decide whether to attend to the Convention proceedings or to the text of the RECOMMENDATION.

The dissenting opinion in the court below very properly deplored a too multitudinous assembly for union convention purposes. "*The Federalist*" (No. 58) beautifully expresses such concern, with, however, a more precise and careful understanding and expression of its true rationale:

> • • • the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. *The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few.* Experience will forever admonish them that, on the contrary, *after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with a whole society*, they will counteract their own views by every addition to their representatives. The *countenance of the government may become more democratic, but the soul which animates it will be more oligarchic.* The machine will be enlarged, but *the fewer, and often the more secret will be the springs by which its motions are directed* (p. 181; emphasis added).

The foregoing classic reasoning can be paraphrased so as to make it apply to what actually transpired at the 66th AFM Convention. There, ignorance was indeed the dupe of cunning; because the *members* were *entirely* ignorant of what was going forward; and the *delegates* were ignorant of the proposed RECOMMENDATION No. 11 until six hours before they were asked, insufficiently prepared as they were, to vote upon it at an "Evening Session" which lasted far beyond midnight. Petitioners can never err more than in supposing that by multiplying the number of ballots cast

by the individual delegates, they increased the *democratic character of the procedure*. Actually, they are merely strengthening "government of a few"; namely, government and control of the Convention by the delegates representing the most populous Locals. They were merely providing another means for manipulating votes, after two tests of voice votes showed that the delegate majority was intractable. There was no opportunity afforded to the *delegates* or to the *members* for deliberation, discussion, "local information", nor for giving play to "diffusive sympathy with the whole society", whose unsuspecting members had no intimation of RECOMMENDATION No. 11. There was the "countenance of democratic government" in what occurred at the 66th Convention. But the "soul that animated it" was all the more oligarchic. The number of ballots was enlarged. But the delegates who controlled that enlarged number of ballots remained the same (1,219 out of 280,000 members). The more secret the springs by which the individual decisions of the 1, 2 or 3 delegates in each delegation were activated, the more the form of "representation" was *aped* and the true meaning of majority rule was repudiated.

12. **The meaning of "democratic".** Petitioners resort to the word "democratic" as if it were a word to conjure with,—a shibboleth whose established or traditional meaning had never shifted. The authors of "The Great Ideas, A Syntopicon" (Vol. 1, Chapter 16, p. 303) present, in an essay entitled "Democracy" a synthesis of their readings from the great, seminal books of the Western Tradition on this subject. The following is quoted from that essay:

> "Of all the traditional names for forms of government, 'democracy' has the liveliest currency today. Yet like all the others, it has a long history in the

literature of political thought and a career of shifting meanings. * * *

"In our minds democracy is inseparably connected with constitutional government. We tend to think of despotism or dictatorship as its only opposites or enemies. * * *

"Throughout all these shifts in meaning and value, the word 'democracy' preserves certain constant political connotations. Democracy exists, according to Montesquieu, 'when the body of the people is possessed of the supreme power'. As the root meaning of the word indicates, democracy is the 'rule of the people'. * * * In the development of the democratic tradition, particularly in modern times, this has been accompanied by the elaboration of safeguards for the rights of man to assure that government actually functions for the people, and not merely for one group of them.

"* * * The specifically democratic element is apparent from the fact that throughout the many shifts of meaning which democracy has undergone, the common thread is the notion of political power in the hands of the many rather than the few or the one * * *" (p. 303).

What happened at the 66th Convention substantiates that the voting power of the large Locals was controlled by the independent, untrammelled discretion of *two* or three delegates. This was not government for the people; but government of and by a small group of "representatives", who were themselves practiced upon by those who beguiled the Convention. Their procedure was rouged here and there with a *verbal* cosmetic: "democracy".

John Stewart Mill, in his "*Representative Government*", identifies democracy with the ideal state:

> "The ideally best form of government is that in which the sovereignty, or supreme controlling power,

> in the last resort, is vested in the entire aggregate of the community, *every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least, occasionally, called on to take an actual part in the government* by personal discharge of some public function, local or general. (Emphasis added; Volume 43, p. 344.)

Such a description has nothing in common with the maneuvers of the 66th Convention.

Respondents make no argument that a "representative" should be "reduced to the ignominious role of a mouthpiece". J. S. Mill properly deprecated the two extremes: (i) where the representative acts on his own without regard to any responsibility toward his constituency and (ii) where the representative slavishly grovels before the will or whims of his constituency. Says the "*Syntopicon*" (*supra*):

> "Between these two extremes, Mill tries to find a middle course, in order to achieve the 'two great requisites of government': *responsibility to those for whose benefit political power ought to be, and always professes to be, employed*: and jointly therewith to obtain, in the greatest measure possible, for the function of government the benefits of superior intellect, trained by long meditation and practical discipline to that special task" (p. 307; emphasis added).

13. **The decision below does not conflict with other provisions of the Act.** The reading given to LMRDA §101 (a) (3) by the Court of Appeals in the light of the facts in this case is the only reading which does not conflict with other provisions of the Act. There is no basis in the concepts (Sections 9, 10, 11 and 12, *supra*) of *majority rule, democratic procedure* or *representative government of*

unions for giving to delegates the voting strength of their memberships, where such memberships are sublimely ignorant of everything under discussion. The very words, "democratic procedures" or "representative procedures", imply some sort of *participation* by *knowledgeable* constituents, or at least by constituents with the *opportunity for obtaining knowledge*. They presuppose consideration, deliberation, discussion. It is empty rhetoric to suggest that the AFM constituents were beneficiaries of *representative government* or *democratic procedure* in respect of the passage by the 66th Convention of RECOMMENDATION No. 11; especially where their representatives could be overruled by a committee of AFM officers and committee chairmen (AFM Constitution, Art. 5).

14. **Title IV of LMRDA is irrelevant.** Title IV of LMRDA has nothing to do with this case. The problem of voting at a Union convention for the purpose of increasing dues or initiation fees in a manner consistent with democratic membership participation is totally different from the problem of democratic elections of Union officers. In elections of Union officers, the indisputable objective is to make the name of the candidate widely known among the members. Candidates' names are never secrets. There was never any union abuse by Union officials trying to keep their candidacies from being known. But there were, previous to the Landrum-Griffin Act, many union abuses by dues increases and increases in initiation fees arranged clandestinely. Congress did not attempt to specify in statutory detail the organizational structures or the minute rules of representation which unions must adopt. Congress did provide a legal standard of judgment for appraising such structures and systems, both in the abstract and in the concrete: Is the union organizational structure and

its system of representation consistent with the goal of safeguarding *genuine democratic procedure within the union* and *truly representative union government* respecting dues and initiation fees?

There is nothing in the "one delegate, one vote" rule which prevents unions from achieving these congressional ends *by proportioning the number of delegates to the number of members* (as is done in the House of Representatives). Where delegations are proportioned to the number of members; and where the members themselves or their locals receive adequate prior notice; a truly democratic or representative system of non-discriminatory voting is insured. Such a rule of "one delegate, one vote" follows the James Wilson ideal (supra, Section 10) of "equal elections". According to the AFL-CIO Brief's questionable Appendix, 19 out of 131 International Unions use the "roll-call" vote method employed by the 66th AFM Convention. There is no way of ascertaining from the AFL-CIO Appendix or from the studies made by the Bureau of Labor Statistics and the National Industrial Conference Board whether weighted voting in *other* unions is given a democratic or representative cast by ancillary provisions requiring fair previous notice of proposals to increase dues and initiation fees. Whatever the facts in this respect (the Record presents no evidence on the point), it should be clear from the legislative history of §101 (a) (3) LMRDA that Congress did not intend the kind of weighted voting system which makes democratic procedure or representative government impossible, as did the AFM "roll-call" vote at the 66th Convention. That AFM system (not 130 other union systems) is our concern on this appeal.

What Congress thought relevant to the *election of officers* on the one hand and what it thought pertinent to

dues increases on the other are two different things. Petitioners (Brief, p. 42) argue that no such considerations "are available"; but they are: (a) A union officer cannot possibly be elected, unless there is previous notice of the election. Dues increases can be effectuated by union officials without previous notice. (b) Officers cannot be elected unless the membership knows them or at least knows their names and the fact that they are candidates. An increase of dues can be put into union by-laws without the knowledge of the members. (c) Officers *need* members in order to be elected. Before the Landrum-Griffin Act, union officers did not need members in order to foist upon them the burden of increased dues; union officers could mandate increases without the help of members. (d) Candidates for union office have every motive to broadcast their candidacy before election. Union officers who want to impose a dues increase dictatorially have, generally, every motive to hide their purpose *before* the imposition. (e) So far as previous notice to and knowledge of the membership are concerned, union by-laws generally provided satisfactory election procedures before the Landrum-Griffin Act. The same was not true as to by-laws *re* notice to members of the purpose to increase union dues. (f) In electing union officials against the members' wishes, a union dictatorship can work only by some plan of *rigged election*. In increasing "dues" (*before* the Landrum-Griffin Act), union dictatorships had no difficulty about imposing dues increases. The project to increase dues is not so easy *since* the Act came into effect.

The foregoing six contrasting considerations show that Congress had good reason to differentiate statutes respecting the *election of officers* from statutes permitting *dues increases*.

15. **Abuses concerning union dues.** If it be true that neither the President nor the Secretary of Labor suggested that "the methods for raising dues had been the subject of any abuse" (Petitioners' Brief, p. 42), that is certainly not the case with respect to the McClellan Committee, as Petitioners' own Brief admits (p. 25, footnote 23; 33; 48, footnote 72; 49). Congress had evidence of numerous instances where union dues were increased by the arbitrary fiat of union leaders, without the knowledge or control of the members.

16. **Undemocratic control by the few.** Most of the delegates at the AFM 66th Convention voted against RECOMMENDATION No. 11 (R. 103; Proc. 7-30; 58-63). Out of more than 605 Locals (Proc. 30) only *four* have more than 5,000 members each. Yet these *four* locals, under the voting procedure defended by Petitioners, acting by the personal preferences of from four to twelve delegates (depending upon the presence of full or partial delegations at the Convention) controlled *60,394 votes. In addition to the four Locals just referred to,* 11 AFM Locals, represented by from 11 to 33 delegates, each have 2,000 members or more. Thus, under the "roll-call vote" procedure, a maximum of 45 delegates (and a minimum of 15 delegates) controlled 91,687 votes. If, to the statistics relating to the 15 Locals just referred to, one adds all AFM Locals having 1,000 or more members, the following conclusion is necessitated: 37 AFM locals out of 675 have from 37 to 111 delegates who control 121,180 ballots out of a total of 271,811 ballots. (The foregoing computations are based on Proc. 7-30; 58-63.) This is scarcely a democratic or representative voting system. For all practical purposes, it is a system which concentrated control over a convention of 1,219 delegates in the hands of *111* delegates (and on the

basis of sufficient absenteeism it could be 37 delegates) who decide, according to their own personal judgment and without the slightest notice to the members they purport to "represent", how they will vote or how they will split their votes. In the process, they multiply the 37 to 111 personal choices (of as many delegates) to arrive at a product of 121,180 votes or ballots, entirely subject to their unlimited control! On top of that comes the admitted vote-splitting and vote duplication described in Respondents' Counterstatement of Facts.

17. **Representation by reasonable ratio.** Using a reasonable ratio of *one* convention delegate for each 250 members, *after initial assignment of one delegate for the first 150 members*, the number of delegates needed (under the weighted voting system "generally" used according to Mr. Meany, R. 110-111) to represent 280,000 members would be about the same as the number (1,219) who actually attended the 66th Convention. In other words, Judge Marshall's fears that the decision on appeal would require 14,000 delegates to represent 280,000 AFM members at a cost of $5,200,000 is utterly without foundation. See ¶15 pp. 26-27 and ¶20 pp. 28-29 of Respondents' "BRIEF FOR RESPONDENTS IN OPPOSITION".

18. **The mere appearance of democratic and representative method.** Petitioners take the following passage from the Court of Appeals decision and draw from it more than its wording warrants:

> Moreover, as appellants claim to be the case, the weighted voting is *to all appearances* the most "democratic" method *in the sense that* each member is duly "represented" and it is a method of voting widely recognized as fair and * * * proper by a number of unions (italics added).

The italics make it possible to distinguish between *appearance* and *reality*. The words in quotation marks suggest judicial doubt on the question whether the procedure was *really* (as contrasted with *verbally* or *by appearance*) "democratic" and whether each member was in fact "represented". The appearance or "countenance" of democratic method is not the same as its reality and "soul", as *"The Federalist"* quoted above shows (Section 11, *supra*). What happened at the 66th AFM Convention was certainly not "democratic" *in any sense of membership participation.* Nor were the members "represented"; because representation on an issue of this type required in the "representatives" opportunity for study, deliberation and discussion; and in the "represented" notice prior to the Convention respecting RECOMMENDATION No. 11 so as to give them opportunity to decide whether they would vote to instruct their delegates. It is common practice for locals to send delegates to an international union's convention with instructions (i) how they are to vote on particular issues and (ii) for whom they are to vote in convention elections. The abuses which prompted Congress to regulate the matter of dues increases were not to be corrected by mere mathematical weighting of ballots. Congress obviously wanted the members to be informed in advance of plans to increase dues and to have at least the chance to participate in the decision; so that dues increases would not be arbitrarily imposed by intra-union dictatorship.

19. **Violation of §101 (a) (1) of LMRDA.** Delegates to AFM Conventions are, of course, AFM members. Section 101 (a) (1) of LMRDA provides: "Every member of a labor organization shall have *equal rights and privileges* within such organization • • • *to participate in the deliberations and voting upon the business of* • • • *meetings*, subject

to reasonable rules and regulations in such organization's constitution and by-laws" (emphasis added). The "roll-call vote" at the 66th Convention flouted this statutory mandate. Only fifteen delegates were permitted "to participate in the deliberations" (Proc. 58). None enjoyed "equal rights and privileges" within the Convention "to participate in * * * voting" on RECOMMENDATION No. 11. Some delegates had as few as 31 (Local 261; Proc. 60) votes while other delegates had thousands of votes (Locals 4, 5, 6, 8, 9 and 10; Proc. 58).

20. **Petitioners' reliance on "evidence" not in the Record.** Petitioners and their allies, as well as the dissenting Judge below, assumed without support from the Record and without trial (in which such generalized assumptions could be subjected to probing examination and cross-examination), that *similar weighted voting systems* are permitted or required by many allegedly representative union constitutions prior to enactment of LMRDA; and that under the majority opinion below each local may not be *represented* at conventions by delegates whose number is proportioned to the number of members of that local.

The AFL-CIO Brief introduces *factual evidence not in the Record*, in the form of an "APPENDIX" which summarizes (according to the unilateral interpretation of the draftsmen of the "APPENDIX") the "Voting Procedures on Finances Used by 131 AFL-CIO affiliates". Of the 131 AFL-CIO unions only 19 are alleged in this "APPENDIX" to have constitutions or bylaws which permit "Delegates at a convention [to] vote the membership they represent" (AFL-CIO Brief, pp. 16-23). Mr. George Meany's affidavit (R. 110-111) states: "* * * most other international unions" achieve *weighted voting* by sending to conventions a "*number of delegates* * * * based on the number of members in

the Local" (emphasis added). Mr. Meany's conclusion in this respect seems to contradict the "APPENDIX" (which is not in the Record):

A system which sends to conventions numbers of delegates proportioned to the numbers of members in the represented Locals is democratic and representative. It is a ***weighting*** **of** ***locals*** **entirely consistent with the opinion below. It avoids concentration of power in a few delegates—the necessary consequence of yielding to a small number of delegates a large number of votes.**

21. **Majority of delegates versus majority of ballots.** Petitioners (Brief, p. 20) complain that the Court below treated the phrase, "by majority vote", as if "majority" modified "delegate", a "reading which renders the word 'vote' entire superfluous". The rule "one delegate, one vote", necessarily makes it a matter of indifference whether you count a majority of the *delegates* or a majority of the *votes*.

Petitioners made the words, "vote" and "delegate", meaningless by their interpretation: "Just as Congress left each union free to determine by its by-laws the number and qualification of convention delegates, so did it allow them to determine the number of votes those delegates should cast" (Brief for Petitioners, 20). If a union could thus "determine the number of votes" its "delegates could cast", it could, by changing the rules of the game during the game, win every election and every vote by assigning weights as it pleased to the delegates' ballots. The AFM officers, having perceived from two *voice votes* that they could not thereby enact RECOMMENDATION No. 11, resorted to an apparently previously prepared strategy. The unwonted method used worked in such a prompt, pat and neatly-executed manner that previous planning was indi-

cated. The "roll-call vote" (never used in more than 20 years of annual conventions) was used instantaneously after the voice vote had twice failed (R. 115-116). Two strike-outs with voice-vote procedure ended in a home-run with the "roll-call" procedure.

22. **The irrelevance of S. 1137.** Because Petitioners give a truncated view of the legislative history of §101(a)(3), they referred to the fact that S. 1137, §104(2), introduced by Senator McClellan, would have *required* some form of weighted voting at international conventions. Actually, as the *two* following quotations from S. 1137 show, the Senator had respect for the *spirit* rather than the mere *countenance* of democratic procedure:

> (2) VOTING AT CONVENTIONS—All delegates elected or designated by the constituent units of an international labor organization • • • to represent such constituent unit at any meeting or convention • • • shall have a vote in all elections for officers and upon other matters brought before such meeting or convention • • • which vote shall be numerically equivalent, or proportionate, to the number of members of such constituent unit • • • (1 Leg. Hist. 278)

[If Senator McClellan had stopped there, Petitioners' invocation of his proposal might have aided their theory on this appeal. However, the Senator did *not* stop there. He knew that a merely mathematical assignment of weights to votes cannot possibly guarantee democratic procedure. The very next paragraph of the Senator's proposal, *which Petitioners did not quote*, reads:]

> (3) NOTICES OF MEETINGS OR CONVENTIONS—Not less than 30 days prior to any meeting or convention of any international labor organization for the elections of officers, directors, trustees, or members of an Executive Committee, a notice shall be sent by

> mail to the secretary of each constituent unit of such organization, which notice shall set forth the time, place and a detailed agenda of such meeting or convention.

The provisions just quoted, requiring notice of a "detailed agenda for such * * * convention", is related to the phrase in the previous paragraph of the quotation: "*to represent such constituent unit* at any * * * convention."

Only if the constituent units, and thus the membership, receive notice of what is going to be acted upon at the Convention can there be genuine *representation* of constituent units or memberships of Locals. That is precisely what did not occur at the 66th AFM Convention, of whose business the constituent units were unapprized.

Petitioners (Footnote 8, Brief, p. 7) refer to the June, *1964*, AFM Convention. *Previous notice of the detailed agenda of the 1964 Convention* was sent to all delegates as required by AFM By-laws. This requirement had been violated respecting the *1963* Convention and RECOMMENDATION No. 11 (R. 80-100, esp. 94-98).

***Democratic* or *representative* procedures *are* insured by** a system of weighting whereby the *number of delegates* is proportioned to the *number of members* in the Local represented by those delegates; just as they might be safeguarded under S. 1137 (had it been passed by Congress) by a system which enabled single delegates to cast votes numerically equivalent or proportionate to the number of members in the Locals, *so long as the Locals are given fair prior notice of the detailed agenda of the Convention*, giving to Local memberships at least *opportunity* to call local meetings for the purpose of instructing the delegates.

There is no reason to believe that Senator McClellan would have been satisfied with §104(2) unless it was accompanied by §104(3).

It is significant that in neither §101(a)(3) of LMRDA nor the AFM Constitution and By-laws is there any requirement for "30 days' written notice to the principal office of each Local or constituent labor organization entitled to such notice" prior to a regular convention, such as there is for a "special" convention. Apparently, Congress did not think 30 days' previous notice was necesary because *most union constitutions provide for adequate previous notice of conventions and of convention agenda.* Therefore, it was not necessary for Congress to legislate such notice where regular conventions were concerned. Every union member knows when and where a national convention is going to be held months in advance; and the international union usually publicize the convention agenda long before the convention begins.

The following sections appear in Article 28 of the AFM By-laws:

> §4. *Delegates or locals desiring to introduce in the convention any resolution or measure must forward same, written and in duplicate, to the International Secretary, not later than fifteen (15) days before the day set for the first session* of the convention.
>
> (a) All such resolutions or measures *shall be printed and distributed to the delegates at said first session.*
>
> (b) In addition, delegates may introduce resolutions until 30 minutes after the closing morning session of the second day of the convention by presenting same to the Chairman.
>
> (c) All resolutions or measures shall be numbered consecutively and printed in compact pamphlet form. • • •
>
> §10. Printed copies of the annual reports of the President, Secretary, Treasurer, Auditor and any resolutions to be submitted at the convention by the Inter-

national Executive Board, if possible, shall be mailed to the accredited delegates to the Convention of the Federation, not earlier than three weeks and not later than two weeks before the opening session of the convention. • • •

§21. *No alterations or amendments to the Constitution or By-laws (except as is otherwise provided in the By-laws or ordered by a Convention) shall be made unless proposed in writing, and said alterations or amendments must receive a majority vote of the delegates present* to become law, unless otherwise provided. (emphasis added)

Although the problem with which the delegates were to deal had existed for several years (*Carroll* v. *AFM*, 295 F. 2d 484, (1961) 2d Cir.); *Cutler* v. *AFM*, 211 F. Supp. 433, S. D. N. Y.; *Cutler* v. *AFM*, 316 F. 2d 546, (2d Cir. 1963) *cert. den.* December 9, 1963); and although full discussion had been promised (Proc. 31; R. 77-78; 80-82); and although the matter was of momentous importance to the AFM, its Locals and its delegates (Proc. 31; R. 77-82); the foregoing provisions of the AFM By-laws were not complied with. No previous notice of RECOMMENDATION No. 11 was given to the membership, the Locals or the delegates prior to the Convention; and only the delegates received, *on the third day of the Convention*, previous notice of *six hours* respecting RECOMMENDATION No. 11!

23. **Mr. Meany's testimony.** What Mr. Meany said in his testimony before the Committee (Petitioners' Brief, p. 28) and the almost identical language in the "AFL-CIO ANALYSIS OF KENNEDY BILL (S. 1555) APPROVED BY THE SENATE (OFF. TEXT)" was, to quote the latter:

"If the Section is assumed to mean what its proponents said they thought it meant, it actually per-

> mits changes in dues and assessments in every way in which unions *generally* change dues or levy assessments, except action by a General Executive Board or similar body." (emphasis added)

This language is not correctly interpreted in Petitioners' Brief (pp. 12; 29): "that the Senate Bill did not forbid" *any of the accepted methods* of raising dues, except by the Executive Board * * *" (emphasis added) Petitioners' Brief omits the following italicized portions of the Meany statement:

> "§101(a)(3) actually permits changes in dues by every method *which unions generally employ* except action by a General Executive Board or similar body." (emphasis added)

Mr. Meany's statement simply means that the Senate Bill did not forbid any of the *"generally"* used methods of raising dues. To leave out the adverb, "generally", is to warp the meaning of Mr. Meany's words and to make them universal.

It begs the essential question to assume that the AFM "roll-call" vote is either "traditional" or "democratic" or that it is used by "scores of international unions". The Meany statement and affidavit and the "AFL-CIO ANALYSIS OF THE KENNEDY BILL" can hardly be construed as a statement *sponsoring* or *supporting* §101(a)(3), no matter in which Bill that section appeared. Mr. Meany was of the opinion that once the change with respect to (i) general executive board and (ii) the referendum vote was made, §101(a)(3) actually permitted "changes in dues by every method which unions *generally* employed." Nothing in the Record supports the proposition that §101(a)(3) requires changes in methods (of increasing or creating dues) which unions "generally" employ. The AFL-CIO

Brief by its Appendix seeks to introduce factual evidence, *as refracted by those who interpreted 131 AFL-CIO Constitutions*, without quotation of the actual language of the 131 Constitutions and without expert testimony, subject to cross-examination. New evidence should not be admitted in a case by means of an Appendix to a brief submitted to this Court. This is especially true where what is involved is the *interpretation* of analysts who prepared the Appendix sans quotation of the actual language interpreted, and sans evidence of practical construction.

24. **Petitioners' misapprehension of the majority decision below.** Petitioners' Brief (p. 29) errs also in the statement that "the House Committee's action conclusively demonstrates that it desired the widest latitude for unions to prescribe their own rules for raising dues as long as those rules allowed membership participation." The words, "widest latitude", are too broad. Petitioners seem oblivious of the limitation they themselves imposed by the clause, "as long as those rules allow membership participation." (Petitioners' Brief, p. 29). There was absolutely no membership participation in the 66th AFM Convention.

Respondents agree that it is not reasonable "to assume that the House Committee would permit dues increases to be made by the Executive Board but not by a convention vote *in which all members were fairly 'represented.*" (emphasis added; pp. 29-30, Pet. Br.). The whole thrust of the complaint is that the members were *not* "fairly represented"; and that the delegates were prevented from fairly *representing* the members through no fault of their own; because RECOMMENDATION No. 11 was kept under wraps until the last minute, and was then sprung upon the uninformed delegates six hours prior to the midnight session at which they voted upon it.

25. **Petitioners' authorities do not support Petitioners' contentions.** The House Committee Report and Representative Griffin, as quoted on page 30 of Petitioners' Brief, are unobjectionable. The one speaks of the right "to participate and decide upon rate of dues * * *" and the other affirms that union members are guaranteed "that their dues and initiation fees will not be increased arbitrarily * * *". The complaint alleges that the AFM members had *no right of participation in the discussion of* RECOMMENDATION No. 11. They were unaware of its existence. In all of the circumstances, RECOMMENDATION No. 11 increased dues and initiation fees "arbitrarily", by finessing RECOMMENDATION No. 11 through the Convention.

The quotation from Judge Marshall's dissent is equally inapposite; because in the instant case, as the complaint shows, the dues increases *were* "imposed by irresponsible and arbitrary union leaders not answerable in any way to the membership at large." Or, to put the matter in the language of the *Banes* case (*Banes* v. *Office Employees*, 317 F. 2d 1915, 1918), the AFM members had no genuine representation at the council table where the dues structures were changed.

Labor Board v. *Fruit Packers*, 377 U. S. 58, 71-72 (Petitioners' Brief, p. 32), is as irrelevant to Petitioners' purposes as Trevelyan's rocker. While the legislative history of the involved legislation provides no specifics, it does repeatedly provide two objectives (that members of unions deserve *genuine representation* and *veritably democratic procedures*) which, precisely because they are *ends*, measure and limit the *means* to accomplish such ends. The end to be achieved always dictates in some way the means or methods of achievement. The undisputed Congressional objectives require construction of §101(a)(3) to ban the AFM weighted voting system in all of the circumstances

of this case. Whatever *else* is genuinely representative and democratic, the 66th AFM Convention, in passing RECOMMENDATION No. 11, was neither.

By taking §101(2) of S. 1137 out of context and by neglecting §101(3), (Petitioner's Brief, p. 33-34) conjure up the theory that Senator McClellan's proposal grew out of certain abuses "uncovered by the McClellan Committee which can flourish under the rule of 'one delegate, one vote' *but are impossible where the delegate votes his full constituency.*" (emphasis added) The abuses to which Senator McClellan referred are especially possible where "the *delegate* votes his full constituency" without the slightest knowledge on the part of the constituency of what is at stake. There is *democratic* and *representative* character in a system which first gives reasonable notice of convention agenda to the members, thus allowing them opportunity to debate and to vote upon instructions to their delegates. There was no such democratic or representative character to the 1963 AFM Convention. For this purpose it does not matter (as Petitioners seem to think it does, Petitioners' Brief, p. 35) whether weighted voting was *allowed* or *required*. The trouble with Petitioners' reasoning in this connection is that Petitioners read §101(2) of S. 1137 "in splendid isolation" (Petitioners' Brief, p. 36).

POINT II.

Section 101(a)(3) of LMRDA as applied to defendants in this case does not conflict with the First Amendment.

The importance of judicial precedents has always been a distinguishing and well recognized characteristic of the Anglo-American system of law. In appraising a precedent

it is commonplace that one must distinguish betwen a *ratio decidendi* and *obiter dicta:*

> "The only judicial principles which are authoritative are those which are * * * relevant to their subject matter and limited in their scope. All others, at best, are of merely persuasive efficacy. They are not true *rationes decidendi*, and are distinguished from them under the name of *dicta* or *obiter dicta*, things said by the way. The prerogative of judges is not to make law by formulating and declaring it—this pertains to the Legislature—but to establish law by applying it. Judicial declaration, unaccompanied by judicial application, is of no authority." *Salmond on Jurisprudence* (8th edition) by C. A. W. Manning, London: Sweet & Maxwell Ltd. (1930), §60, p. 202.

It is not the function of this brief to discuss the *dicta* of the Court below. Plaintiffs-Respondents simply contend that *in the circumstances of this case and against the background of its peculiar facts and events*, the Court below properly interpreted and applied the statute to Petitioners and in no way violated the first Amendment.

It is the purpose of this Point to deal briefly with the insubstantial arguments made by Petitioners to show that, as construed below and as applied in this case, Section 101(a)(3) conflicts with the First Amendment.

A. With respect to this alleged question of constitutionality, Respondents contend that this Court should not "anticipate a question of constitutional law in advance of the necessity for deciding it." *Ashwender* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348. The complaint here (R. 26-41) seeks a declaratory judgment declaring

> "(A) that the aforesaid Convention procedure concerning 'Recommendation No. 11' was illegal and that the resolution in question (Recommendation No. 11) is null and void under the Act and under defend-

> ants' Constitution and By-laws; and (b) that the Resolution which purported to enact 'Recommendation No. 11' at said Convention * * * is null and void; and
>
> "(B) Preliminary and permanent injunctions enjoining defendants from carrying into effect the aforesaid resolution which purported to enact 'Recommendation No. 11' * * *".

It was defendants below (not plaintiffs) who brought the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Court, *sua sponte*, granted summary judgment. In fact, it was only *partial summary judgment;* since it declared illegal not the *entire* RECOMMENDATION No. 11 (which Appellees were seeking in their complaint) but only paragraphs 2, 3 and 4 thereof (R. 143-144). Technically, the District Court should have applied Rule 56(d) in this case.

In any event it is Appellees' contention that the Petitioners are premature in trying to anticipate the question of constitutional law in advance of trial of the remaining issues raised by the complaint. It is certainly conceivable (and Appellees contend it is probable) that trial of the issues raised by the complaint will show that the entire RECOMMENDATION No. 11 is illegal on the grounds (a) that conduct of the Convention violated AFM laws; (b) that, as held by the Court below, part of RECOMMENDATION No. 11 violated Section 101(a)(3) of the Act of 1959; and (c) that the officers who conducted the Convention, especially the Presiding Officer, violated their fiduciary responsibilities under Section 501 of the Act of 1959 in pushing RECOMMENDATION No. 11 through the Convention. Appellees claim that with respect to contentions (a) and (c) the District Court had pendent jurisdiction. *Hurn* v. *Oursler*, 289 U. S. 338.

This Court will not act upon a constitutional question, even when properly presented by the record, if there is also present some other ground upon which the case may be disposed of (*Ashwender* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348).

This Court will ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided (*Ashwender* v. *Tennessee Valley Authority*, *supra*).

This Court has at times refused to entertain jurisdiction in an allegedly constitutional case, even though that jurisdiction is invoked as of right, where the record was inadequate for decision of the constitutional issues. *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *International Brotherhood* v. *Denver Mill Producers*, 334 U. S. 809.

Much of the argumentation to be found in the dissenting opinion of Judge Marshall and in the Petitioners' Brief, as well as in the Briefs submitted by the AFL-CIO and the Department of Justice, *assume the existence of facts which are not to be found in the Record*. The Appendix of the AFL-CIO Brief contains, in summary, tabular form, a lengthy series of constructions and applications of 131 AFL-CIO union constitutions, whose relevant and applicable language is not even quoted, and evidence of whose practical construction is nowhere to be found in the Record. "Appendix A" is untested by direct examination or by cross examination of qualified witnesses. The qualifications of those who prepared Appendix A are not stated. Nor is their manner of procedure explained in adequate detail.

No constitutional right of assembly or free association is prejudiced or even threatened by the majority opinion below. Petitioners set limits to the reach of their argument as follows: "The constitutionally protected right to association necessarily encompasses the right to determine

the rules governing its structure and procedure; that right in turn may NOT be infringed without some overriding public purpose * * *."

The short answer is that there *were* "overriding public purposes"; namely, to *democratize* and to make *more representative* the process by which Union dues or initiation fees are established or increased. This public purpose is eminently served by the statute as construed below. The members were at all times prior to its enactment totally in the dark as to RECOMMENDATION No. 11. In all of the circumstances of the Convention, the delegates themselves were prevented from intelligently representing their constituents by their own lack of information, study and deliberation and by the actual cloture of discussion effected by the lateness of the hour and by the limitation on debate.

If, as Petitioners consider it obvious, "*self-organization* means that those who join in a common cause themselves prescribe the rules by which their organization exists and functions" (Brief, p. 53); and if the National Labor Relations Act guarantees to employees the right of self-organization; Petitioners' argument makes all federal regulation of Union rules unconstitutional. Petitioners speak hyperbolically of Government's "unfettered power to fix the rules by which organizations may make decisions" (Brief, p. 53). Of course there is not, and there is no claim that there should be, any "unfettered power" in the government or in anyone else.

It is gross error to argue that "the statute (as construed by the majority below) outlaws long recognized Union procedures for self-government admittedly without advancing membership participation—the provisions' sole avowed purpose." Petitioners themselves conducted the Convention so as to prevent membership participation in processing RECOMMENDATION No. 11.

In *Thomas* v. *Collins*, 320 U. S. 516 (cited by Petitioners, Brief p. 53) a statute mandating registration before solicitation of union membership was found to violate the right of peaceable assembly. That case has no application here. The same is true of the others cited on pages 52-56 of Petitioners' Brief.

In any event, the case should be remanded to the District Court for trial of *all* of the issues raised by the Complaint. Only a trial (where the *verbatim* minutes of the Convention will have to be produced) will place in the Record the nature and scope of Petitioners' efforts to limit delegate and membership participation respecting RECOMMENDATION No. 11.

Conclusion.

By reason of the foregoing, the judgment of the Court of Appeals should be affirmed; or, in the alternative, the case should be remanded for trial to the District Court in order to provide a proper record for decision of the alleged Constitutional and Federal questions.

Respectfully submitted,

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